No. 82-1549

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

VICTOR DOMINGO GARCIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Respondents offer three arguments in opposition to the petition for a writ of certiorari in this case. They contend (Br. in Opp. 13) that the case is moot because the indictment has been dismissed, that the government did not properly preserve in the courts below the questions on which it seeks this Court's review, and that the petition presents only a question of state law over which this Court lacks jurisdiction. As we show below, respondents' contentions are all lacking in merit.

1. As we noted in our petition (at 9 n.7), and in our supplemental brief in *United States* v. *Villamonte-Marquez*, No. 81-1350 (filed Mar. 15, 1983), the dismissal of the indictment does not affect this Court's jurisdiction to hear this case. Because the issue will presumably be decided by the Court in *Villamonte-Marquez* in any event, we see no need to elaborate further upon our position. For present purposes, it is sufficient to note that the cases cited by

respondents (Br. in Opp. 14) are fully consistent with our position. In *Arrington* v. *United States*, 350 F.Supp. 710 (E.D. Pa. 1972), aff'd, 475 F.2d 1394 (3d Cir. 1973) (table), the court observed that a defendant "cannot be *prosecuted* unless a valid indictment has been returned against him" (*id.* at 711; emphasis added). The court went on to note, however, that a valid indictment "is sufficient to *start* a trial of the charge on the merits and satisfies the requirements of the Fifth Amendment" (*id.* at 712; emphasis added). Thus, as we pointed out in our supplemental brief in *Villamonte-Marquez* (at 3), an indictment is required only to *try* a defendant on federal felony charges. Where, as here, whatever disposition of the case is made by this Court will not, in any event, result in a retrial, the necessity for the indictment ceases. Nothing in *Arrington* suggests the contrary. Similarly, in *United States* v. *Clark*, 412 F.2d 885 (5th Cir. 1969), the court reversed a conviction upon finding that "the conduct for which [defendant] was convicted was not an indictable offense * * *" (*id.* at 886). In other words, the indictment was invalid ab initio and could not support the conviction under any circumstances. Here, respondents raise no question concerning the sufficiency of the original indictment, nor do they dispute the fact that no retrial will occur in this case. Thus, as in *Villamonte-Marquez*, the need for the indictment has long since come to an end.

2. Respondents incorrectly argue (Br. in Opp. 15) that the questions presented by the petition were not raised in the courts below until the government filed its petition for rehearing in the court of appeals.[1] Respondents first

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[1] As we demonstrate below, respondents' argument is factually incorrect. It should also be noted, however, that respondents cite no authority for the proposition that issues squarely presented to a court of appeals in a rehearing petition are not properly preserved for this Court's review. Indeed, the Court has suggested that this is not so. See *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).

chastise the government for not presenting its arguments to the district court. But they conveniently overlook the fact that the district court ruled in the government's favor, denying respondents' motions to suppress the evidence, even before the government had an opportunity to complete the presentation of its case in opposition to the motions (Tr. 157-158; see also Pet. 6-7). Thus, there was no reason, and no occasion, for the government to argue in the district court that federal rather than state law should govern the outcome of this case or that, in any event, the Fifth Circuit's "reasonable mistake" exception to the exclusionary rule (see *United States* v. *Williams*, 622 F.2d 830, 840-847 (1980) (en banc), cert. denied, 449 U.S. 1127 (1981)) should apply here.

Respondents also mischaracterize the proceedings in the court of appeals. On appeal, the first argument presented by respondents (appellants below) was that the officers lacked reasonable suspicion to justify the stop of the tanker truck and also lacked probable cause either to arrest respondent Mungia or to search the tanker truck; accordingly, respondents argued that the fruits of the search should be suppressed (Appellants' Brief 17). In a footnote, respondents stated (*id.* at 17-18 n.*; emphasis added):

> The analysis [in appellants' brief] relies exclusively upon federal law, though the initial interference with Defendant Mungia's liberty was caused by two Texas *state* officers. Ordinarily, the legality of a state arrest is tested by reference to state law * * *. *Nevertheless, since the district court relied exclusively on federal law, we have continued. Ultimately, of course, the state of Texas is bound by the Fourth Amendment requirement of reasonableness, so the result here should be the same.* * * *

Respondents also acknowledged that the same *federal* legal analysis governed the question whether there was probable cause to arrest respondents Garcia and Barrera-Saenz (*id.* at 32).

In response, the government likewise analyzed the reasonable suspicion and probable cause issues under federal law (see U.S. Br. 11-20). Thus, implicit in both respondents' and the government's approach to these questions in the court of appeals was the assumption that the applicability of the exclusionary rule turned on whether the officers had complied with the *federal constitutional* standards of reasonable suspicion and probable cause. That is precisely the first question presented by the petition (see Pet. I, 9-19). Admittedly, the issue could have been more precisely identified in both sides' briefs to the court of appeals, but that is no reason for arguing that the court of appeals had no opportunity to rule on the question. Moreover, any ambiguity in the government's approach to the case was unquestionably resolved in our petition for rehearing, in which the second question presented was as follows (Pet. for Reh. 2):

> 2. Assuming that Texas game wardens do not possess general arrest powers, whether the exclusionary rule should be applied in a federal criminal trial to the fruits of an arrest that meets federal constitutional standards but is deficient under state law.

Quite clearly, this is the same issue as that presented by the first question in the petition. Thus, there can be no credible argument in this case that the court of appeals was denied the opportunity to pass on the first question that we ask this Court to review.

Finally, there is not the slightest doubt that the "reasonable mistake" issue, presented by the second and third questions in the petition (Pet. I), was properly preserved at all stages of the appeal.[2] See U.S. Br. 23; Pet. for Reh. 6. (Respondents do not explain how it is that the court of appeals came to rule explicitly on this issue (see Pet. App. 16a-17a) if, as they contend, it was not even presented.)

3. Respondents' final argument is frivolous. They contend (Br. in Opp. 16) that "there is no federal question involved here" because the court of appeals simply applied Texas law; accordingly, respondents argue (*ibid.*) that "this Court lacks jurisdiction to review the case." In support of this novel contention, respondents cite two cases that came to this Court from state supreme courts (*Jankovich* v. *Indiana Toll Road Commission*, 379 U.S. 487 (1965); *Cramp* v. *Board of Public Instruction*, 368 U.S. 278 (1961)). In both cases, of course, the Court was required to determine whether the state courts' decisions rested on independent and adequate non-federal grounds that would have defeated the Court's jurisdiction under 28 U.S.C. 1257. Obviously, no such rule applies to this Court's certiorari jurisdiction under 28 U.S.C. 1254(1), which authorizes review of *any* final judgment rendered by a federal court of appeals. See, *e.g.*, R. Stern & E. Gressman, *Supreme Court Practice* § 2.1, at 52 (5th ed. 1978) (footnote omitted) ("It is to be noted that the jurisdiction thus granted [under 28 U.S.C. 1254(1)] is of an extremely comprehensive nature. It extends to 'any civil or criminal case' in the courts of

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[2]The third question presented by our petition (whether application of a "reasonable mistake" exception to the exclusionary rule in a federal criminal proceeding is a matter of state or federal law) is merely a subpart of the second question presented (whether a "reasonable mistake" exception should have been applied in this case).

appeals. There are no * * * restrictions as to the matter at issue or the nature or form of the decision below").

In any event, the government does not seek review of the court of appeals' ruling that Texas game wardens lack general arrest powers under state law. Rather, the questions we present are quintessentially matters of federal law, going to the heart of the rules applicable to federal criminal prosecutions. As we explained in our petition (at 14-15, 21-23), state law is totally irrelevant to the correct resolution of the questions we present.

CONCLUSION

For the reasons stated above and in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
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